

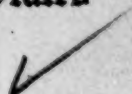
No 1081

APR 8 1946

CHARLES ELMORE GROFFLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1945.



HILDA M. GLASSER, as Trustee in Bankruptcy
of the Estate of HELEN RUSSELL ROGERS,
Petitioner,

AGAINST

CHARLES FRANCIS ROGERS, HELEN RUSSELL
ROGERS, and HARRY N. WESSEL,
Respondents.

**Petition for Writ of Certiorari to the United
States Circuit Court of Appeals for the
Second Circuit and Supporting Brief.**

SIDNEY S. BOBBÉ
Attorney for Petitioner.

BENJAMIN LEIBOWITZ,
Of Counsel.



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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Supporting Brief.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents this petition for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit.

Statement of Matter Involved.

Petitioner filed suit in the United States District Court for the Southern District of New York on July 11th, 1944 to set aside, as in fraud of creditors, an assignment by the bankrupt to her former husband of her remainder

interest in certain trusts created by the will of her father and to set aside a subsequent re-transfer in May, 1944 by the former husband to his attorney (R. 5, 6).

The will of the bankrupt's father was probated in a Probate Court in Connecticut and the Hartford-Connecticut Trust Company was named as trustee under that will.

The Hartford-Connecticut Trust Company was not made a party to the action in the United States District Court.

After issue was joined, the Hartford-Connecticut Trust Company instituted an interpleader suit in the Superior Court of Hartford County in Connecticut on August 18th, 1944 and joined petitioner and respondents as defendants. The plaintiff in that suit alleged that petitioner had notified it that she claimed the assignment was void as in fraud of creditors and alleged that an action was pending in the District Court between petitioner and respondents to declare the assignment fraudulent, and prayed that the defendants be required to interplead (R. 6, 13).

Petitioner is a resident of New York and was served by registered mail in New York on August 22nd, 1944 (R. 12).

On October 16th, 1944 an interlocutory judgment was made by the Connecticut Court directing that the defendants interplead and file their claims by October 20th, 1944 and appear on that day for the purpose of proving their respective claims. Notice of this was given to petitioner by the Clerk of the Connecticut Court by mail on October 16th, 1944 (R. 16).

On October 20th, 1944 petitioner's counsel appeared before the Superior Court and pointed out that in order to prove petitioner's claim, depositions would have to be taken in New York and that notice of three days was insufficient for that purpose and asked for a continuance, or, in the alternative, that the Court direct payment to the assignee and leave open the issue as to whether the as-

signment was in fraud of creditors, to be litigated in the suit then pending in the District Court. Counsel representing the respondents thereupon stated to the Superior Court that the assignee was financially responsible and worth many times the amount involved (R. 13-15).

The Connecticut Court on the same day made a final decree containing only the following adjudication:

"that the plaintiff pay and turn over and deliver said property to the defendant Harry N. Wessel and that said plaintiff thereupon be discharged of all further liability to any and all the defendants thereto and that the plaintiff be allowed his costs of suit and the sum of two hundred (\$200.) Dollars for counsel fees and disbursements payable out of said property" (R. 7, 8).

Respondents then moved for leave to set up the Connecticut judgment as a defense in bar. The District Court granted the motion and stated in its memorandum opinion:

"Whatever be the merits or demerits of the proposed supplemental answer, this motion is granted. The validity of the judgment to be set up depends among other things on the character of the service which involves a question of fact. The moving affidavit does not state the service. The sufficiency at law of the judgment should be decided on a different motion or at the trial" (R. 17).

Respondents then moved for summary judgment dismissing the complaint on the ground that the Connecticut judgment was *res judicata* of the issues here involved.

The District Court recognized that the Connecticut action was one of interpleader and that the Supreme Court had held interpleader to be *in personam* in *New York Life*

Insurance Co. v. Dunlevy, 241 U. S. 518 and that the New York Court of Appeals had made a similar ruling in *Hanna v. Stedman*, 230 N. Y. 326. The District Court also recognized the difficulty in overcoming the effect of the *Dunlevy* case and though unable to find any contrary authority, granted the motion on the theory that this particular interpleader was *in rem* (R. 9).

The Circuit Court took the view that petitioner was mistaken as to the nature of the Connecticut action and that even though it was brought under a Statute permitting interpleader suits and though it had all of the forms of such an action, that it was not interpleader (R. 19). The District Court, the Connecticut Court, and all the parties to this action and to that action had considered the Connecticut suit to be one of interpleader.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10th, 1945. By order of this Court dated March 9th, 1946 the time for filing a petition for certiorari was extended to April 9th, 1946. Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Questions Presented.

1. Whether the Connecticut interpleader action was an action *in personam* and therefore not binding on petitioner because personal service was not made on her in Connecticut.
2. Even if it is *in rem* and bars petitioner from any action against the Hartford-Connecticut Trust Company, whether it is a bar to this action to set aside the assignment as in fraud of creditors, in view of the limited ex-

tent of the adjudication in the Connecticut decree and under the application of the doctrine of *res judicata*.

3. Whether a three day notice by mail within which to file a claim and to present evidence that the assignment was in fraud of creditors, where depositions would be required, could be considered as having afforded petitioner an adequate opportunity of being heard.

4. Whether the respondents are estopped from contending that the Connecticut Court adjudicated the issues involved in this action because of their statement made to the Connecticut Court to induce that Court, we contend, to leave open these issues.

Reasons Relied on for the Allowance of the Writ.

Petitioner respectfully submits that the case calls for the exercise of this Court's power of supervision in that the decisions below are in conflict with the decision of this Court holding an interpleader action to be one *in personam*, and by the failure to apply the doctrine of *res judicata* in accordance with the decisions of this Court and the settled application of the doctrine, whereby petitioner has been deprived of an opportunity of presenting her cause of action for adjudication.

Petitioner respectfully prays that a writ of certiorari be allowed.

Dated: New York, N. Y., April ..., 1946.

HILDA M. GLASSER, as Trustee,

by SIDNEY S. BOBBÉ,
Counsel for Petitioner.

BENJAMIN LEIBOWITZ,
Of Counsel.